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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1012 89

REPPLIER COAL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

No. 1013 90

REPPLIER COAL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TRUMAN HENSON,
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No. 1012

REPPLIER COAL COMPANY,

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No. 1013

REPPLIER COAL COMPANY,

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vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner, Repplier Coal Company, by Truman Henson, its attorney, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled causes on February 19, 1944.

Opinions Below.

The opinion of the Tax Court of the United States (R. 5) is unreported. The opinion of the Circuit Court of Appeals (R. 22) is reported in 140 Fed. (2d) 554.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on February 19, 1944 (R. 29). The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

The Questions Presented.

1. Whether, for income and declared value excess profits tax purposes, the petitioner, a coal mining corporation, claiming percentage depletion, was entitled to deduct, as an ordinary and necessary expense, the cost of a mine tunnel which served only to maintain, and not to increase, the petitioner's established annual output of coal, and which was driven long after the petitioner's mine had passed the development stage.

2. Whether the Circuit Court of Appeals erred in holding and deciding that the decision of the Tax Court on the foregoing question was final and not subject to review by the Circuit Court of Appeals.

3. Whether, for purposes of determining net income from a mining property within the meaning of Section 114 (b) (4) of the Revenue Acts of 1934 and 1936, the petitioner's cost of miners' labor was any more than the wages actually paid such miners, plus the cost to petitioner of miner's supplies furnished them by petitioner, at fixed charges to be deducted from wages, pursuant to petitioner's contract with the Miners' Union, where the cost to the petitioner

of such supplies was less than the charges so made therefor.

4. Whether the Circuit Court of Appeals erred in holding and deciding that the decision of the Tax Court on the foregoing question was final and not subject to review by the Circuit Court of Appeals.

5. Whether, where in prior years both the petitioner and the Commissioner of Internal Revenue, mistakenly, as a matter of local real estate law, assumed that petitioner's plant, which was located on leased lands, would pass from petitioner upon the expiration of the then existing leases, and, in consequence, the petitioner erroneously claimed, and the Commissioner erroneously failed to disallow, accelerated depreciation which the Tax Court found to have been excessive, the petitioner's depreciation base should be reduced by any more of such excessive depreciation for such prior years than the amount thereof which served to reduce petitioner's taxes.

6. Whether the Circuit Court of Appeals erred in failing to hold and decide that the decision of the Tax Court on the foregoing question was final and not subject to review by the Circuit Court of Appeals.

Statement.

This case involves federal income tax for the calendar years 1935 and 1936, and declared value excess profits tax for the year 1936.

Since 1922, the petitioner, a Pennsylvania corporation, has been and still is, engaged in mining and selling coal in the Commonwealth of Pennsylvania, primarily on leased land (R. 6, 7, 8). The petitioner's mine had passed the development stage long prior to 1936 and its output had been established at a little over 300,000 tons per year (R. 18).

In 1936, the petitioner drove a mine tunnel at a cost of $86,394.03, which made available 394,000 tons of coal (of which 5,659 tons were produced and sold in 1936) and which served substantially to maintain, but not to increase, the established annual output (R. 10, 18).

Petitioner's method of accounting for such expenditures was to set them up as deferred expense and spread the deduction over the period of the production and sale of the coal. On its return for 1936, the petitioner deducted one-tenth of the cost of the tunnel, but if that cost were to be spread over the coal made available for production, according to the amount thereof produced in each year, the amount allocable to 1936 would be $1,240.19 (R. 10, 15, 18). The Tax Court decided the petitioner was not entitled to any deduction for the cost of the tunnel, because the petitioner had elected to take percentage depletion (R. 15, 16), and the Circuit Court of Appeals affirmed on the ground that the decision of the Tax Court was final and not subject to review (R. 24, 25).

Under its contract with the Miners' Union, the petitioner was obligated to furnish dynamite and miner's supplies and to rent miner's lamps to its miners at fixed charges which were to be deducted from the wages which would otherwise have been payable (R. 9, 19). Such supplies cost the petitioner less than the deduction so made from wages on that account (R. 9, 19). The petitioner claimed depletion on the percentage basis (R. 10, 19). Under the statute, deductible percentage depletion is fixed at five per centum of gross income, but not more than fifty per centum of net income, from the property.[1] The Commissioner of Internal Revenue reduced net income from petitioner's property, and

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[1] Sec. 114 (b)(4), Revenue Act of 1934, C. 277, 48 Stat. 680 and Sec. 114 (b)(4), Revenue Act of 1936, C. 690, 49 Stat. 1648, infra, Appendix, p. 22.

thereby reduced the deduction for depletion, in 1935 and 1936, by asserting that petitioner's cost of miners' labor was the gross amount of wages which would have been (but were not in fact (R. 10, 19)) paid to miners, had not the supplies aforesaid been furnished and charged at the contract prices. The Tax Court upheld the Commissioner's determination (R. 14, 15). The Circuit Court of Appeals affirmed on the ground that the decision of the Tax Court was final and not subject to review (R. 26).

The leases of the lands upon which petitioner conducted its mining operations and on which its plant was located were acquired in 1922 and one of them was to expire in 1932 and the other in 1934. Petitioner constructed its New Castle plant and railroad siding in the years 1925 and 1926 (R. 7). During the years 1930 through 1934, the petitioner claimed largely accelerated depreciation on its returns, upon the basis that the plants should be written off during the remaining terms of the leases, which did not contain renewal clauses. The Commissioner did not disturb or adjust the said returns for the years 1930 to 1934, inclusive, except for a minor reduction of depreciation for 1930 (R. 8). In his deficiency notice, the Commissioner disallowed all depreciation on petitioner's plant for the taxable years 1935 and 1936 except on minor additions made during the years 1935 and 1936, upon the ground that petitioner's depreciation base had theretofore been exhausted by "allowable" depreciation.

The Tax Court held that writing the plants off over the terms of the original leases was erroneous, for while, as stated, neither lease contained a renewal clause, the leases contained provisions recognizing that the plants and improvements were to remain petitioner's property upon termination, and such would have been the result under the law of the Commonwealth of Pennsylvania even had the

leases been silent upon the point (R. 9, 11, 12, 13). While the petitioner had no assurance the leases would be renewed, the fact is that both leases were in fact renewed and the petitioner has uninterruptedly operated, and is still operating, under them and has uninterruptedly continued the owner of and in possession of the plants and improvements, which are still in use by it (R. 8, 9).

It was stipulated, and the Tax Court found as a fact, that the useful physical lives of the plants and improvements were twenty years from time of construction, and the Tax Court also found that a reasonable allowance for exhaustion, wear and tear, and the allowable rate of depreciation, for petitioner's New Castle plant and siding was at all times only five per centum per annum, which was very much less than the accelerated depreciation claimed on petitioner's returns for the years 1930 to 1934, inclusive, as aforesaid (R. 8, 9). During the last named period the petitioner sustained large losses (R. 8). It did reap some benefit in some years from the excess of the claimed depreciation over the five percentum per annum which was properly allowable; and petitioner makes no claim that its depreciation base should not be reduced by the full amount of claimed depreciation of which it received benefit. The petitioner, however, did not receive any advantage from a large part of the excess of the claimed depreciation over that which was allowable (R. 8).

The Tax Court adjusted petitioner's depreciation base under Section 113 (b)(1)(B) of the statute and restored to the petitioner's depreciation base of its New Castle plant and siding so much of the excessive depreciation, which the petitioner erroneously claimed and the Commissioner erroneously failed to disallow, which did not result in any advantage to the petitioner or in any detriment to the Government (R. 13). The Circuit Court of Appeals reversed

the Tax Court on the authority of this Court's recent decision in *Virginian Hotel Corp.* v. *Helvering,* 319 U. S. 523.

Reasons for Granting the Writ.

1. The Court below, in holding and deciding that the petitioner's cost of driving a mine tunnel, which served only to maintain and not to increase, its established output, was not deductible as an ordinary and necessary operating expense, either in the year the tunnel was driven and paid for, or ratably, over the production of the coal, because of petitioner's having claimed percentage depletion under Section 114 (b)(4) of the Revenue Act of 1936, has rendered a decision conflicting in principle with the decisions of the Circuit Courts of Appeals for the Ninth, Fifth and Fourth Circuits in *Guanacevi Mining Co.* v. *Commissioner* (C. C. A. 9), 127 Fed. (2d) 49, 51; *U. S.* v. *Roden Coal Co.* (C. C. A. 5), 39 Fed. (2d) 425, and *Marsh Fork Coal Co.* v. *Lucas* (C. C. A. 4), 42 Fed. (2d) 83, in both of which it is stated that such costs are deductible expenses.

2. On the same point, the Court below has decided an important question of federal income tax law which we believe has not been, but should be, settled by this Court.

3. On the same point, the Court below appears to have decided a question of great public importance, of vital interest to the whole coal and metal mining industry in a way which is contrary to the published ruling, the regulations and the longstanding practice of the Treasury Department, contrary to the weight of authority and contrary to the interpretation to be accorded the statute because of repeated re-enactment in the light of the ruling, regulations, practice and authorities mentioned.

Guanacevi Mining Company v. *Commissioner, supra;*

Marsh Fork Coal Company v. *Lucas, supra;*

Enterprise Coal Company v. *Phillips* (C. C. A. 3), 84 Fed. (2d) 565, affirmed 12 Fed. Supp. 49;
Little War Creek Coal Co. v. *U. S.* (C. C. A. 4), 104 Fed. (2d) 483, affirming 25 Fed. Supp. 764;
U. S. v. *Roden Coal Co.* (C. C. A. 5), 39 Fed. (2d) 425;
Norris & Montgomery "Uniform Classification of Accounts for Anthracite Coal Operators" (1919), p. 12;
W. B. Reed "Bituminous Coal Mining" (1922), p. 201;
C. E. Mengel "Anthracite Production Costs," Bulletin of National Association of Cost Accountants, April 15, 1941;
G. C. M. 13954, C. B. XIII-2, 66;
Regulations 45, 1920 Edition, Article 222 (a);
Regulations 62, Article 222 (a);
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Regulations 69, Article 222;
Regulations 74, Article 242;
Regulations 77, Articles 235 and 221(h);
Regulations 86, Articles 23(m)-15 and 23(m)-1 (h);
Regulations 94, Articles 23(m)-15 and 23(m)-1 (h).

4. In holding and deciding that the decision of the Tax Court on this point was final and not subject to review by the Circuit Court of Appeals, the Court below has decided an important question of federal income tax law in a way which, it is submitted, is in conflict with the applicable decisions of this Court, including *Helvering* v. *American Dental Co.*, 318 U. S. 322, and *Dobson* v. *Commissioner of Internal Revenue*, — U. S. —, 64 S. Ct. 239, 88 L. E. Ad. Op., p. 179, petition for rehearing denied — U. S. —, 64 S. Ct. 495, 88 L. E. Ad. Op., p. 459. The decision of the Tax Court on the point, it is submitted, was the decision of a question of law, or, at least, of a mixed question of law and fact, which was subject to review, and should have been reviewed, by the Circuit Court of Appeals.

5. In holding and deciding that the petitioner's cost of labor, for purposes of determining net income from petitioner's mining property within the meaning of Section 114 (b)(4) of the Revenue Acts of 1934 and 1936, was any more than the amount of wages actually paid, plus the cost to petitioner of miner's supplies furnished, the Court below has decided a question of federal income tax law in a way conflicting in principle with extant analagous authority.

S. S. T. 138, Cumulative Bulletin, 1937-1, p. 442.

S. S. T. 326, Cumulative Bulletin, 1938-2, p. 325.

Commissioner's letter, March 24, 1937, noted at Para. 5203.341, Vol. 1, C. C. H. Unemployment Insurance Service.

UCD release, Pennsylvania Unemployment Compensation Law, Case No. 37 (1937), Vol. 5, C. C. H. Unemployment Insurance Service, Para. 1201.02.

Appeal No. B-44-5-RH-112 (12-7-42), idem, para. 1201.02.

6. In holding and deciding that the decision of the Tax Court on this point was final and not subject to review by the Circuit Court of Appeals, that Court decided a question of federal income tax law in a way which, it is submitted, is in conflict with the applicable decisions of this Court, including *Helvering* v. *American Dental Co.*, supra, and *Dobson* v. *Commissioner of Internal Revenue*, supra. The decision of the Tax Court on the point, we urge, was the decision of a question of law, or, at least, of a mixed question of law and fact, which was subject to review, and should have been reviewed, by the Circuit Court of Appeals.

7. The Court below held that the depreciation point in this case was governed by the decision of this Court in *Virginian Hotel Corp.* v. *Helvering,* supra.

In the *Virginian Hotel* case, this Court held that, on the facts in that case, depreciation theretofore claimed and not disallowed was "allowed" irrespective of whether any "tax benefit" accrued to the taxpayer, citing *Helvering* v. *State-Planters Bank & T. Co.*, (C. C. A. 4), 130 Fed. (2d) 44, which was a "bad debt" decision that whether a deduction was "allowed" did not depend upon whether a "tax benefit" thereby accrued. In the case of *Dobson* v. *Commissioner*, supra, however, this Court expressly disapproved the "bad debt" cases of which *Helvering* v. *State-Planters Bank & T. Co.*, supra, was an example. With great respect it is suggested that, in view of the situation just referred to and the division of this Court in the case of *Bessie P. Douglas* v. *Commissioner of Internal Revenue*, No. 131, October Term, 1943, decided May 15, 1944, unofficially reported in C. C. H. United States Supreme Court Bulletin, Vol. 4, No. 26, p. 1319, it may not be amiss for this petitioner to pray that this Court will review this case and, to the extent it may fall within the ambit of the *Virginian Hotel* case, consider whether the latter decision expresses the present views of this Court.

If the *Virginian Hotel* case is to be regarded as expressing the present thought of this Court, it is suggested that the instant case may not fall within the *Virginian Hotel* decision, in that it does not appear from the opinion in that case that the taxpayer therein urged (as was, and is, urged by the petitioner herein), that the Commissioner should not be heard to allege his own failure to disallow unallowable depreciation, as the basis for depriving the petitioner of a part of its depreciation base, where both the petitioner and the Commissioner were acting under the same mistake of law, and neither the Commissioner nor the Government's collection of its taxes was prejudiced.

Further, in this case, it was expressly found by the Tax Court that the depreciation claimed in prior years was

actually excessive and unallowable, and that such excessive depreciation was not "allowed" to any extent in excess of the amount thereof which served to offset taxable income. It is respectfully suggested that this case should be reviewed by this Court in order to settle whether, where such findings have been made by the Tax Court, those findings are final and not subject to review under this Court's decision in the *Dobson* case, supra.

In view of the great and widespread importance of this question, it is respectfully requested that this Court review this case.

Wherefore, your petitioner respectfully prays that this petition for writs of certiorari be granted.

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